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CONSTITUTIONAL LAW

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This survey does not purport to set forth and discuss all of the cases involving issues of state and federal constitutional law decided by the State Supreme Court at the last term. Coverage is limited to those decisions which seem to be particularly noteworthy. The cases selected deal with the pre-emptive effect of the Smith Act,[1] equal protection of the laws and the state statute making miscegenation a crime, delegation of legislative power to administrative tribunals, legislative limitations on the power of the courts to issue equitable relief, and the negative implications of the Commerce Clause restricting state power to tax interstate businesses. The decisions will be discussed in this order.

PRE-EMPTION AND SUBVERSIVE ACTIVITY

State v. Jenkins[2] involved a defendant charged with violating the State Subversive Activities Law[3] by being a member of the Communist Party with knowledge of its foreign subversive character. The State Supreme Court affirmed the district judge's granting of a motion to quash on the ground that the Smith Act, as interpreted by the Supreme Court of the United States in *Pennsylvania v. Nelson*,[4] pre-empts state power to enforce such legislation.

The Smith Act prohibits advocacy of the overthrow of the government of the United States by force and violence, and the exact issue in the *Nelson* case, to which the Supreme Court of the United States gave a negative answer, was whether a state could proscribe the same conduct.

Thus the *Nelson* decision left open the question of whether a state may prohibit advocacy of overthrow of local government by force and violence. As might be expected, the prosecutor pressed the point in the *Jenkins* case that the *Nelson* decision does not foreclose a state from punishing acts of sedition against local government. However, the State Supreme Court, reason-

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1. 54 STAT. 670 (1948), 18 U.S.C. § 2385 (1959).
2. 236 La. 300, 107 So.2d 648 (1958).
3. LA. R.S. 14:366-380 (1950).
4. 350 U.S. 497 (1956).

ing that membership in the Communist Party with knowledge of its objectives necessarily involves subversive activity against the United States as well as the State of Louisiana, rejected the argument.

The court specifically reserved judgment on the question of what it will do with a case which involves only acts of sedition committed against the state government. It is now clear, since the decision of the Supreme Court of the United States last term in *Uphaus v. Wyman*,[5] that the *Nelson* doctrine does not operate to pre-empt state power in that situation.

Accordingly, future enforcement of the State Subversive Activities Law will probably be largely under R.S. 14:367, which makes it a felony to engage in prescribed subversive acts, with the bills of information or indictment drawn so as to limit the charged offense to acts or the advocacy of acts involving the violent overthrow of the government of the State of Louisiana or its political subdivisions.

Enforcement of R.S. 14:368, which makes it a felony to belong to a subversive organization with knowledge of its subversive character, will be more difficult. However, the *Jenkins* decision does not necessarily seem to foreclose a charge drawn under that section, provided that it specifies that the organization is subversive, as the term is disjunctively defined in R.S. 14:366, solely because it advocates overthrow of local government by force or violence.

EQUAL PROTECTION OF THE LAWS AND MISCEGENATION

State v. Brown[6] involved two persons convicted of the crime of miscegenation in violation of Article 79 of the Louisiana Criminal Code, which provides: "Miscegenation is the marriage or habitual cohabitation with knowledge of their difference in race, between a person of the Caucasian or white race and a person of the colored or negro race."

Relying on the case of *Pace v. Alabama*,[7] the Louisiana Supreme Court held that the statute does not violate the equal protection and due process clauses of either the Louisiana or the United States Constitutions. In the court's view, marriage is a status of specialized local interest, and a state statute which

5. 360 U.S. 72 (1959).
6. 236 La. 562, 108 So.2d 233 (1959).
7. 106 U.S. 583 (1883).

prohibits intermarriage between members of different races is permissible because of the state's interest in preventing the propagation of hybrid children who will have difficulty in gaining acceptance in the society.

However, the court reversed the conviction and granted a new trial on the ground of error in the trial judge's instructions to the jury in which he defined the term "habitual cohabitation," as used in the statute, as "access for the purpose of sexual intercourse as a matter of habit." Drawing an analogy to the decisions construing the term "cohabitation," as used in Article 78 of the Criminal Code dealing with the crime of incest, the court held that "cohabitation" means sexual intercourse, and that "habitual cohabitation" means customary or repeated acts of sexual intercourse.

On the point of constitutional law, *Pace v. Alabama* affords solid support for the court's position insofar as it holds that a state has power to make extra-marital cohabitation between whites and Negroes a greater crime against the community than extra-marital cohabitation between members of the same race.

The *Pace* case involved an Alabama statute which punished adultery or fornication when committed by a white and a Negro more severely than when committed by persons of the same race. In a short and unanimous opinion by Mr. Justice Field, the Supreme Court of the United States held that the Alabama statute did not offend the guarantee of equal protection of the laws because the white person who had engaged in inter-racial sexual relations was subject to punishment as severe as the Negro participant.

The opinion made clear that a state has the power to treat bi-racial extra-marital sexual relations as a greater offense against the community than mono-racial extra-marital sexual relations. Although the point was not articulated by Mr. Justice Field, the existence of such power must necessarily rest upon the proposition that a state legislature may rationally believe that the former conduct poses a greater threat to public health, safety, morals, and welfare than the latter; or, to put it differently, that there is a reasonable basis for the classification.

It does not necessarily follow, however, from the *Pace* decision, that a state may refuse to permit the members of different races to enter into a marital relationship. Such a con-

clusion is permissible only if the implicit proposition of the *Pace* case is extended to include, as a reasonable legislative belief, that bi-racial marriages pose threats to public health, safety, morals, or welfare that mono-racial marriages do not.

The Louisiana court accepted that proposition in *State v. Brown*, and there is little doubt that, if orthodox equal-protection-of-the-laws theory is applicable to the situation, the court's disposition of the federal constitutional question is sound. All of the states that have faced the problem have, with the exception of California, reached the same conclusion.[8]

The trouble is that a lot of water, notably *Brown v. Board of Education*,[9] has gone under the dam since *Pace v. Alabama* was decided in 1883. Marriage is controlled by the states, but so is public school education. Surely a state legislature may reasonably believe that there is a rational relationship between preventing the propagation of hybrid youngsters and the public welfare. But, by the same token, one may reasonably believe that there is a rational relationship between maintaining racially-segregated public schools and preventing violence and interracial friction. Yet this is not, under the holding in *Cooper v. Aaron*,[10] a valid reason for excluding children from specified public schools solely by reason of their race.

Analytically, a statute prohibiting miscegenation does not raise the question of racial discrimination, for such a statute operates as fully against white persons who desire such a marital relationship as it does against Negroes. The real question posed is one of freedom of association.

However, the same thing may be said about state-enforced segregation in public facilities. Assuming that the separate facilities are in fact equal in every way susceptible to proof, the segregation system works as much against whites as it does against Negroes, that is, it deprives each racial group of what-

8. Green v. State, 58 Ala. 190 (1877); State v. Pass, 59 Ariz. 16, 121 P.2d 882 (1942); Dodson v. State, 61 Ark. 57, 31 S.W. 977 (1895); Jackson v. Denver, 109 Colo. 196, 124 P.2d 240 (1942); Scott v. Georgia, 39 Ga. 321 (1869); State v. Gibson, 36 Ind. 389 (1871); State v. Jackson, 80 Mo. 175 (1883); *In re* Shun T. Takahashi's Estate, 113 Mont. 490, 129 P.2d 217 (1942); State v. Kennedy, 76 N.C. 232 (1877); *In re* Paquet's Estate, 101 Ore. 393, 200 Pac. 911 (1921); Lonas v. State, 50 Tenn. 287 (1871); Frasher v. State, 3 Tex. App. 263 (1877). *But see* Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17 (1948).

9. 347 U.S. 483 (1954).

10. 358 U.S. 1 (1958).

ever benefits are derived from "mixing." Again the real issue is one of freedom of association.

Thus, the state-enforced segregation cases have precedential force so far as the disposition of the miscegenation problem is concerned. This is not to say, and certainly not to predict, that the Supreme Court, applying the principle of *Brown v. Board of Education*, should or will strike down state statutes prohibiting inter-racial marriages. Such a judgment or prognosis would be fatuous until it is a good deal clearer than it is now exactly what the principle of *Brown v. Board of Education* is.

The Supreme Court of the United States has rather cavalierly, in a series of *per curiam* decisions, extended *Brown v. Board of Education* to public transportation, parks, golf courses, bath houses, and beaches,[11] without bothering to write any opinions attempting to identify the principle of constitutional law involved. Moreover in 1956, in *Ham Say Naim v. Naim*,[12] the court dismissed, *per curiam*, an appeal from a Virginia decision annulling a marriage, because it violated the state statute prohibiting miscegenetic marriages, on procedural grounds which have been described as "wholly without basis in the law."[13]

The handling of the *Naim* case is interesting because of what it reveals about the Court's disposition to take hold of the miscegenation problem.

The statute at issue was squarely challenged by the defendant on due process and equal protection grounds under the Fourteenth Amendment, and the Supreme Court of Appeals of Virginia, in affirming the decree of the trial court, ruled squarely against him on that question. On appeal, the Supreme Court of the United States vacated the judgment and remanded the case for return to the trial court for reopening and development of evidence as to the relationship of the parties to Virginia, so that

11. New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958), affirming per curiam, 252 F.2d 122 (5th Cir. 1958); Gayle v. Browder, 352 U.S. 903 (1956), affirming per curiam, 142 F.Supp. 707 (M.D. Ala. 1956); Holmes v. City of Atlanta, 350 U.S. 879 (1955), reversing per curiam, 223 F.2d 93 (5th Cir. 1955); Mayor & City Council v. Dawson, 350 U.S. 877 (1955); affirming per curiam, 220 F.2d 386 (4th Cir. 1955); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954), reversing per curiam, 202 F.2d 275 (6th Cir. 1953).

12. 197 Va. 80, 87 S.E.2d 749 (1955), vacated, 350 U.S. 891 (1955), on remand, 197 Va. 794, 90 S.E.2d 849 (1956), appeal dismissed, 350 U.S. 985 (1956). See also Jackson v. State, 37 Ala. App. 519, 72 So.2d 114 (1954), certiorari denied, 260 Ala. 698, 72 So.2d 116 (1954), certiorari denied, 348 U.S. 888 (1954).

13. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

the constitutional question could be presented "in clear-cut and concrete form," unclouded by the problem of an inadequate record and the failure of the parties to raise all questions relevant to the disposition of the case.

The record showed that the Chinese defendant and his Caucasian wife, the plaintiff, had left Virginia and gone to North Carolina in order to evade the Virginia statute at issue. Immediately after their marriage they had returned to Norfolk and lived together as man and wife. The plaintiff was a resident of Virginia at the time she instituted the action to annul the marriage; the defendant was not. Apparently the Supreme Court was disturbed because the record did not show whether the parties were residents of Virginia when the marriage was celebrated in North Carolina or when they set up housekeeping in Norfolk.

The Virginia court, finding that the record was adequate to support both the trial court's decision and its decision on review, including of course disposition of the federal question, held that the judgments were final as a matter of state law and that state rules of practice and procedure did not permit such a case to be returned to the trial court for reopening. Accordingly, the Virginia court adhered to its prior decision.

On the ground that the second decision by Virginia left the case "devoid of a properly presented federal question," the Supreme Court denied a motion either to recall the mandate and set the case for argument on the merits or to recall and amend the mandate, and dismissed the appeal.

Its handling of the *Naim* case seems to be a clear manifestation of the Court's reluctance to come to grips with the miscegenation problem. However, it is hard to believe that it will not ultimately do so. It would be profoundly ironic, if not downright irresponsible, for the Court perfunctorily to extend *Brown v. Board of Education* to a wide range of public facilities while at the same time ducking the miscegenation question.

The principal difficulty for a lawyer with the state-enforced segregation cases, whether one "likes" them or not, is, as Professor Wechsler has put it: "[I]f . . . freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant." If the state must, as a practical matter, "choose between denying the asso-

ciation to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?"[14]

If there is such a basis, the Court has thus far failed to identify it. The *Brown* case itself was based either upon the district court's finding of fact or upon judicial notice that the separate-but-equal formula has no place *in public school education* because segregated schools produce pernicious effects upon colored youngsters, implying their inferiority, and thereby impeding their mental development. Thus they are "inherently unequal." Aside from the troublesome question of whether the evidence supported such findings or whether it was proper court behavior to take judicial notice of such "facts," *Brown v. Board of Education* at least purported to rest upon proofs and dealt only with the question of racial segregation in public facilities which, under compulsory schooling laws, everyone is required to use. However, the subsequent *per curiam* decisions, which in effect determine that the separate-but-equal formula has no place in public transportation, parks, golf courses, bath houses, and beaches, apparently mean that claims *for* association prevail over claims *against* association in *all public* facilities.

The principle of constitutional law compelling these extensions of *Brown v. Board of Education* is not clear. But, whether based on reason or fiat, if the Constitution requires that claims *for* association must prevail in class actions involving public facilities where many of the members of the class affected by the change from a segregated system to an integrated system do not support the claim, that is, prefer disassociation, why should the claim *for* association not prevail in the miscegenation situation where the persons involved, individually and personally, desire association?

On this analysis, *Brown v. Board of Education* and the subsequent *per curiam* decisions make the case involving the constitutionality of a state statute prohibiting miscegenation an *a fortiori* one of invalidity.

Yet, on the other hand, the Supreme Court has recognized, time and again, that the states have wide latitude to restrict freedom of association where an overriding state interest justi-

14. *Ibid.*

fies the restriction.[15] Certainly such an interest underlies a statute preventing miscegenation.

"[T]he main constituent of the judicial process" is the writing of principled decisions which rest "with respect to every step that is involved in reaching judgment on analysis and reasons,"[16] "reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices . . . of a state, those choices must . . . survive . . . . The virtue or demerit of a judgment turns . . . entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees or . . . to maintain the rejection of a claim that any given choice should be decreed."[17]

The Supreme Court of the United States, by failing to accord judicial process in the state-enforced segregation cases, has made for itself a nice dilemma in the handling of the miscegenation problem. Its avenue of escape, assuming that evasion of the issue will not go on forever, is not readily discernible.

DELEGATION OF LEGISLATIVE POWER TO ADMINISTRATIVE TRIBUNALS

Historically the Louisiana Supreme Court has been rigorous in requiring that the legislature, in delegating power to administrative agencies, set forth an intelligible statutory command against which the propriety of specific exercises of discretion may be judged.[18] Accordingly, it is not surprising that in *Banjavich v. Louisiana Licensing Board for Marine Divers*, and three companion cases, the court struck down, on the ground that it constitutes an unlawful delegation of legislative power to an administrative body, Act 196 of 1958, which regulates the occupation of marine diving.[19]

15. Uphaus v. Wyman, 360 U.S. 72 (1959); Adler v. Board of Education, 342 U.S. 485 (1952); Garner v. Board of Public Works, 341 U.S. 716 (1951). *Cf.* NAACP v. Alabama, 357 U.S. 449 (1958); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Wieman v. Updegraff, 344 U.S. 183 (1952).

16. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

17. *Id.* at 19-20.

18. See *The Work of the Louisiana Supreme Court for the 1957-1958 Term—Constitutional Law*, 19 LOUISIANA LAW REVIEW 364, 369-370 (1959).

19. 237 La. 467, 111 So.2d 505 (1959); Veverica Marine Divers, Inc. v. Louisiana Licensing Board for Marine Divers, 237 La. 501, 111 So.2d 517 (1959); Daspit v. Louisiana Licensing Board for Marine Divers, 237 La. 502, 111 So.2d 517 (1959); Inman v. Louisiana Licensing Board for Marine Divers, 237 La. 503, 111 So.2d 518 (1959).

Although the opinion by Justice McCaleb expressed doubt about the constitutionality of the statute as a matter of due process, the decision was based solely on the ground that those provisions of the statute which empower the Board to prescribe examinations for all applicants for a license as "it deems necessary and proper" constitute an improper delegation of legislative power because they commit to the untrammeled discretion of the Board the power to say who is entitled to engage in the business of marine diving without reference to any statutory standard, general or specific. Such a delegation constitutes not only a violation of the separation of powers concept, but it also amounts to a denial of equal protection of the laws since there is no prescribed rule or standard to which all persons similarly situated must conform.

The most significant aspect of the decision is the holding that there is a property right in pursuing the vocation of marine diving, even though it is performed upon or under part of the public domain, which, upon a showing of irreparable harm worked by the statute and preliminary administrative action, gives the plaintiffs standing to raise a constitutional question and justifies equitable interference with the enforcement of a statute the violation of which is a crime.

The decision on this point is difficult to reconcile, as the three dissenting Justices pointed out, with earlier cases involving the operation of "jitneys" on public streets[20] and fishing with a seine in fresh waters.[21] The majority distinguished these cases on the ground that they involved police regulation of the use of public streets and public waters, whereas the statute at issue in the instant case involved regulation of a particular business or vocation, the place where the work was done being immaterial to the purpose of the legislation.

The distinction is tenuous, but it is analytically defensible. Moreover, the result is appealing. The proofs showed that to deny the plaintiffs relief and hold that they could only raise the issue of unconstitutionality as a defense to criminal or equitable proceedings initiated by the administrative agency would deprive them of an adequate remedy against a patently invalid statute.

20. LeBlanc v. New Orleans, 138 La. 243, 70 So. 212 (1915); Godfrey v. Ray, 169 La. 77, 124 So. 151 (1929).

21. Louisiana Oyster & Fish Co. v. Police Jury, 126 La. 522, 52 So. 685 (1910).

LEGISLATIVE LIMITATIONS ON JUDICIAL POWER TO ISSUE INJUNCTIONS

In *Roksvaag v. Reily*,[22] the court had before it the question of whether or not Revised Statutes 26:304, prohibiting the district courts from issuing restraining orders or injunctions in matters pertaining to the withholding, suspending, or revoking of permits to sell alcoholic beverages, is unconstitutional on the ground that it contravenes Article VII, Section 2, of the Louisiana Constitution, which empowers the courts, in aid of their respective jurisdictions, to issue any and all needful writs, orders, and process.

Relying on such earlier cases as *Douglas Public Service Corporation v. Gaspard*,[23] which invalidated the so-called Little Norris-LaGuardia Act,[24] insofar as it limits the courts' jurisdiction to issue equitable relief in cases arising out of labor disputes, on the ground of conflict with Article I, Section 6, of the Louisiana Constitution,[25] the State Supreme Court struck down the statute.

Justices McCaleb and Hawthorne dissented. The opinion by the former raised two objections to the court's disposition of the case: (1) that the plaintiff had no property right to engage in the liquor business which justified equitable intervention; (2) that the plaintiff had an adequate remedy against the Collector for refusing a permit, to wit, appealing to the district court and proceeding by way of mandamus.

It is interesting to note that Justice McCaleb wrote the court's opinion in the marine diving cases, holding, *inter alia*, that there is a protectable right to engage in that business. On the other hand, Justice Ponder, who dissented in the marine diving cases on the ground in part that the plaintiffs' interests were not justiciable, wrote the court's opinion in the *Roksvaag* case, holding the other way as to the selling of beer.

THE COMMERCE CLAUSE AND STATE POWER TO TAX INTERSTATE BUSINESSES

The decisions of the Supreme Court of the United States last

22. 237 La. 1094, 113 So.2d 285 (1959).
23. 225 La. 972, 74 So.2d 182 (1954).
24. LA. R.S. 23:821-849, especially 841 and 844 (1950).
25. "All courts shall be open and every person for injury done him in his rights, lands, goods, person, or reputation shall have adequate remedy by due process of law and justice administered without denial, partiality or unreasonable delay."

Term upholding the power of a state to levy an apportioned net income tax on a foreign corporation doing exclusively interstate commerce within its boundaries[26] afford powerful support for the decisions of the State Supreme Court in *Brown-Forman Distillers Corp. v. Collector of Revenue*[27] and *International Shoe Co. v. Fontenot.*[28]

In the former case the court held that the state net income tax could be laid, apportionately, on a foreign corporation selling whiskey in Louisiana even though its only local activity consisted of so-called "missionary" men who called on wholesale dealers and helped to set up displays at retail outlets. In the latter case the court upheld the tax as applied to a foreign corporation whose only contact with the state was through salesmen who regularly and systematically solicited local retailers and displayed samples.

However, on September 14, 1959, Congress passed S. 2524, which provides that no state may levy a tax on net income derived within its boundaries by an out-of-state corporation if the only activities within the taxing state by or on behalf of the foreign corporation are the solicitation of orders for sales of tangible personal property. Thus, the statute seems to make it clear that Louisiana can no longer do what the state court said it could do in the *Brown-Forman* and *International Shoe* cases.

There is a possible basis for challenging the constitutionality of this statute on the ground that while Congress has authority under the Commerce Clause to redistribute state and national power to *regulate* interstate commerce,[29] it lacks such power in respect to the *taxation* of interstate commerce. However, optimism over the success of such an attack does not seem to be justified. Even those members of the Supreme Court whose positions on free national markets versus state taxing power are sharply opposed seem to agree that Congress has authority to draw lines demarking the limits of state power to tax interstate commerce and the incidents thereof.[30]

It could also be argued that the statute offends due process

26. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959); Williams v. Stockham, 358 U.S. 450 (1959).
27. 234 La. 651, 101 So.2d 70 (1958), cert. denied, 359 U.S. 28 (1959).
28. 236 La. 279, 107 So.2d 640 (1958), cert. denied, 359 U.S. 984 (1959).
29. *In re* Rahrer, 140 U.S. 545 (1891).
30. See Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944) (opinion by Mr. Justice Frankfurter); J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) (dissenting opinion by Mr. Justice Black).

because it is a piecemeal effort which limits state authority only in respect to foreign corporations selling "tangible personal property." But this argument runs counter to a long line of cases holding that if Congress has power with respect to a matter, it need not exercise all of it in order to satisfy the requirements of the Fifth Amendment.[31]

There has been a great deal of speculation about the constitutionality of the State Gas Gathering Tax,[32] the subject of which is the privilege of gathering gas, that is, transporting it, after severance from the well, to the first meter at or near the well. In *Bel Oil Corporation v. Fontenot*,[33] a case involving gas gathered by a Louisiana corporation for an intrastate purchaser, the State Supreme Court struck down the statute on the ground that it constitutes an additional "tax or license" on gas leases or gas rights in contravention of Article X, Section 21, of the State Constitution.[34]

Rights acquired under gas leases, under the reasoning of the court, include exploring, producing, and marketing. The right to market includes the right to transport and measure because these activities are necessary to the effective exercise of gas leases or rights. Moreover, they are an integral part of severing gas and reducing it to possession.

The *Bel Oil* case involved intrastate commerce and the decision is supported by an independent, adequate state ground. Accordingly, it makes consideration of the federal question of the constitutionality of the tax, under the Commerce Clause, as applied to gas gathered for interstate markets, academic.

LOCAL GOVERNMENT LAW

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OFFICERS

The Lawrason Act,[1] which provides for the government of

31. See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
32. LA. R.S. 47:671-677 (1950).
33. Docket No. 44,761 (Nov. 9, 1959).
34. "Taxes may be levied on natural resources severed from the soil or water, to be paid proportionately by the owners thereof at the time of severance; . . . . No severance tax shall be levied by any Parish or other local subdivision of the State.

"No further or additional tax or license shall be levied or imposed upon oil, gas or sulphur leases or rights, nor shall any additional value be added to the assessment of land, by reason of the presence of oil, gas or sulphur therein or their production therefrom. . . ."

LA. R.S. 47:631-646 (1950) levies a tax on the privilege of severance of gas.

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1. LA. R.S. 33:321-481 (1950).